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Informalisation in international labour regulation policy: profiles of an unravelling

Deirdre McCann¹

In Diamond Ashiagbor (ed) *Imagining Labour Law for Development: Informal Work in the Global North and South* (Oxford: Hart Publishing) (in publication, December 2018)

1. INTRODUCTION

The ILO Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204) introduced a novel objective to international-level policy on informal work: that states should, as a key element of formalisation policies, prevent informalisation. Awareness of informality, as Ashiagbor points out,² and as the contributions to this volume testify, is invigorating the debates on the role, form, and future of labour regulation. Yet informalisation as a discrete process has tended to be neglected in informality policy. It is therefore crucial to single out informalisation as a distinct element of the evolving growth in informality, and to reflect on the demands that it imposes on law and policy.

This chapter is the first scholarly investigation of informalisation in global labour regulation policy. The chapter explores how recent regulatory discourses absorb and convey the processes of informalisation, with a particular focus on the role of legal regulation. Section Two highlights anxiety about the expansion of informal work, including in middle- and high-income countries, situating the problem within the 'unacceptable forms of work' framework. Section Three explores the academic literature on the regulatory dimension of informality, highlighting two crucial insights - that informality exists on a continuum, and that legal regulation mediates the shifting boundaries between the formal and the informal. Section Four examines informalisation in international regulatory policy. The regulatory sites examined are the pivotal transnational spheres of the World Bank and the International Labour Organization (ILO). Section Five concludes that a shift in ILO informality discourses to embrace informalisation is significant, but has not been absorbed in the Organization's conception of the functioning or potential of labour regulation. It argues that informalisation must be better integrated into the formalisation project, including as an objective of improving and sustaining job quality in the formal economy. As a crucial element of this project, the chapter concludes by calling for a new approach to labour law - a pre-emptive approach - that is aimed at preventing the unravelling of decent jobs.

2. POST-CRISIS INFORMALITY AND THE UNACCEPTABLE FORMS OF WORK PARADIGM

Prominent in analyses of the enduring fallout of the global financial and economic crisis are signs of the expansion of informal economies, including in middle- and high-income

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² Diamond Ashiagbor [CHAPTER IN THIS VOLUME].

countries.³ Disproportionately associated with poverty, poor job quality and insecurity,⁴ any growth in informal work poses a formidable risk to efforts to reduce work-centred poverty, and is therefore a broader challenge to social and economic development.⁵ The outcomes embrace a range of deficient labour practices, including the delay or non-payment of wages, excessive hours, unpaid overtime, high earnings volatility, risky health and safety conditions, and the denial of collective rights.⁶ It is also clear that deficient manifestations of informal work are disproportionately concentrated among historically-disadvantaged groups, including women and young workers.⁷

For these reasons, this chapter situates the problem of informality, and its expansion, in the presence of unacceptable forms of work (UFW).⁸ This notion is derived from a recently emergent ILO policy discourse that singles out UFW as a site of urgent action, defining these working relations as jobs in ‘conditions that deny fundamental principles and rights at work, put at risk the lives, health, freedom, human dignity and security of workers or keep households in conditions of extreme poverty.’⁹ An associated research project has since generated a conceptual framework - a Multidimensional Model - to identify and address UFW, designed as a diagnostic tool for local actors in economies at a range of levels of development.¹⁰ A premise of the Multidimensional Model is that informal work is not inevitably unacceptable, yet, given its association with UFW, a site that is ripe for regulatory intervention.¹¹

3. INFORMALISATION: TOWARDS THE REGULATORY CONDUITS

³ Johannes Jütting and Juan R. de Laiglesia (eds), *Is Informal Normal? Towards More and Better Jobs in Developing Countries*, (Paris, OECD, 2009). See also Henrik Huitfeldt and Johannes Jütting, ‘Informality and Informal Employment’ in OECD, *Promoting Pro-Poor Growth: Employment and Social Protection* (Paris, OECD, 2009), 95-108; M. Anne Visser, ‘A Floor to Exploitation? Social Economy Organizations at the Edge of a Restructuring Economy’ (2016) 31 *Work, Employment and Society* 782.

⁴ eg Martha Chen, ‘Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment’ in Basudeb Guha-Khasnobis, Ravi Kanbur, and Elinor Ostrom (eds), *Linking the Formal and Informal Economy: Concepts and Policies* (Oxford, OUP, 2006); David Kucera and Theodora Xenogiani, ‘Persisting Informal Employment: What Explains It?’ in Jütting and de Laiglesia *ibid.*

⁵ Jütting and de Laiglesia *ibid* at 13.

⁶ Martha Alter Chen, ‘The Informal Economy: Recent Trends, Future Directions’ (2016) 26(2) *New Solutions* 155; OECD, *Employment Outlook* (Paris, OECD, 2015), ch 5; Françoise Carré and James Heintz, ‘Toward a Common Framework for Informal Employment across Developed and Developing Countries,’ WIEGO Working Paper (Statistics) No 26 May 2009 (revised March 2013), 9.

⁷ ILO, *World of Work* (Geneva ILO 2014); on Africa, James Heintz and Imraan Valodia, ‘Informality in Africa: A Review’ WIEGO Working Paper No. 3, September, 2008, 8.

⁸ See further Deirdre McCann and Judy Fudge, ‘Unacceptable Forms of Work : A Multidimensional Model’ (2017) 156 *International Labour Review* 147.

⁹ In the 2013 report to the International Labour Conference, the ILO Director-General included UFW among Areas of Critical Importance for the Organization, ILO, *Towards the ILO Centenary: Realities, Renewal and Tripartite Commitment Geneva* (Geneva, ILO, 2013), para 49. Action on UFW has since been incorporated as an objective of the ILO’s contribution to the UN 2030 Agenda and the Sustainable Development Goals. See www.ilo.org/global/topics/dw4sd/lang--en/index.htm.

¹⁰ McCann and Fudge, ‘Unacceptable Forms of Work’ (n 8); McCann and Fudge, ‘A Strategic Approach to Regulating Unacceptable Forms of Work’ *Journal of Law and Society*, forthcoming 2019. See further Project on *Legal Regulation of Unacceptable Work*, supported by the UK Economic and Social Research Council (ESRC) through the Global Challenges Research Fund [Grant no. ES/P00746/1] <https://www.dur.ac.uk/law/policyengagement/ufw/ufw/>.

¹¹ McCann and Fudge, ‘Unacceptable Forms of Work’ (n 8).

The global crisis propelled informalisation to the forefront of the debates on rising informality.¹² This notion has been attached to a range of definitions in the policy and scholarly literatures, pointing to a risk of a conceptual incoherence.¹³ Some definitions are insufficient to anchor a robust conception of informalisation. The term periodically functions, for example, to denote expanding informality: the broader trend towards labour markets that are significantly characterised by the presence of informal work.¹⁴ Sharper imagery of informalisation, however, has been associated with the shift in the international policy realm from an enterprise-centred notion of informal work to a job-centred model.¹⁵ This shift in the models of informality has embraced a more refined account of processes of informalisation within the formal economy. The earlier enterprise-centred conceptions - hinging on enterprise-size and legal status - neglected key manifestations of informal work, and in particular excluded the formal sector, missing the dynamics of informalisation.¹⁶ More recent models, underpinned by the job-centred rendition of informality ('all economic activities by workers and economic units that are - in law or in practice - not covered or insufficiently covered by formal arrangements'¹⁷) capture the diversity of informal employment across countries at different levels of development.¹⁸ These models encompass informal jobs in the formal sector: that a 'growing proportion of jobs possess what may be called informal characteristics, i.e. without regular wages, benefits, employment protection, and so on.'¹⁹

The evolution towards job-centred conceptions of informality has crystallised informalisation as a distinct dynamic of informality of increasing significance. As Standing has pointed out, traditionally informal economic activities were taken mainly to encompass the means of survival of the rural and urban poor.²⁰ In more recent decades - in both industrialised and industrialising countries - there has been a trend towards enterprises informalising their

¹² eg Jütting and de Laiglesia, *Is Informal Normal* (n 3).

¹³ Kanbur has raised a similar objection to the notion of informality, Ravi Kanbur, 'Conceptualising Informality: Regulation and Enforcement' 2009 52(1) *The Indian Journal of Labour Economics* 33, 33.

¹⁴ eg James Heintz and Robert Pollin, 'Informalization, Economic Growth and the Challenge of Creating Viable Labor Standards in Developing Countries,' Political Economy Research Institute, Working Paper Series 60, June 2003.

¹⁵ On this shift, see Carré and Heintz 'Common Framework' (n 6); Elizabeth Hill *Worker Identity, Agency and Economic Development: Women's Empowerment in the Indian Informal Economy* (London, Routledge, 2010); Supriya Routh 'Building Informal Workers Agenda: Imagining 'Informal Employment' in Conceptual Resolution of 'Informality' (2011) 2(3) *Global Labour Journal* 3; Martha Chen 'The Informal Economy: Definitions, Theories and Policies,' WIEGO Working Paper No 1, 2012); Colin Williams and Mark Lansky, 'Informal Employment in Developed and Developing Economies: Perspectives and Policy Responses' (2013) 152 *International Labour Review* 355, and the discussion in McCann and Fudge 'Unacceptable Forms of Work' (n 8) at pp 165-66. See further Section 4.2 below.

¹⁶ International Conference of Labour Statisticians *Resolution Concerning the International Classification of Status in Employment, Adopted by the 15th International Conference on Labour Statisticians* (Geneva, ILO, 1993).

¹⁷ ILO *Resolution concerning Decent Work and the Informal Economy* (Geneva, ILO 2002) para 3. See Section 4.2 below.

¹⁸ ILO *ibid*; International Conference of Labour Statisticians (ICLS) 2003 *Guidelines concerning a Statistical Definition of Informal Employment* (Geneva, ILO, 2003); Chen 'Rethinking the Informal Economy' (n 4), Chen 'The Informal Economy' (n 4); ILO, *Statistical Update on Employment in the Informal Economy* (Geneva, ILO, 2012).

¹⁹ Guy Standing, 'Global Feminisation Through Flexible Labor: A Theme Revisited (1999) 27 *World Development* 583, 585.

²⁰ *Ibid*, at 587.

labour processes. Standing and others have linked the rise in flexible labour relationships from the 1980s, to informalisation across the world, including through formal firms in the global North that sub-contract production to workers in developing countries.²¹

Informalisation has long been recognised in low-income settings. In this regard, Theron, on the South African experience, offers contrasting notions of informalisation ‘from above’ and ‘from below.’²² The latter captures the conceptions of informality that are familiar from the literatures on the global South: individual workers devising survivalist strategies in response to job losses.²³ ‘Informalisation from above,’ more pertinently for present purposes, equates with the notion of informalisation pursued in this chapter: it unfurls through the capacity to bypass labour laws by resorting to either outsourcing or retrenchment.²⁴ This process has been identified in recent years, for example, in the signs from India and a number of African countries that growing numbers of workers in the small formal sectors are not protected by labour law, including through outsourcing and sub-contracting.²⁵

Awareness of comparable trends in higher-income settings is more recent. Early in the post-crisis era, for example, Jütting and de Laiglesia spotted a growing trend towards informalisation in OECD countries, which they attributed to heightened international competition in the course of globalisation, offering as an example the phenomenon of false self-employment.²⁶ Visser has also pointed to an expansion of the informal economy in industrialised economies that is limiting access to benefits, training opportunities, access to social services, security, and the right to organise.²⁷

²¹ Standing *ibid.*, at 585. See also Martha Alter Chen, ‘Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment,’ DESA Working Paper No. 46 ST/ESA/2007/DWP/46, July 2007, 9, citing Michael Piore and Charles Sabel, *The Second Industrial Divide* (New York, Basic Books, 1984).

²² Jan Theron, ‘Informalization from Above, Informalization from Below: The Options for Organization’ (2010) 11 (2 & 3) *African Studies Quarterly* 87.

²³ *Ibid.*

²⁴ *Ibid.* Drawing on this model, Webster et al have recently analysed the South African private security industry as engaging in ‘informalisation from above,’ as employers gradually increase outsourcing to labour-brokers and workers are de facto excluded from the operation of many labour laws. Edward Webster, Katherine Joynt and Thabang Sefalafala, ‘Informalization and Decent Work: Labour’s Challenge’ (2016) 16(2) *Progress in Development Studies* 203, citing T. Sefalafala, *Precarious Work: A Case Study of Security Guards in Johannesburg* (Johannesburg, University of Witwatersrand, 2012).

²⁵ Heintz and Valodia, ‘Informality in Africa’ (n 7); Paul Benjamin (assisted by Urmilla Bhoola), ‘Subordination, Parasubordination and Self-Employment: A Comparative Study of Selected African Countries’ in Giuseppe Casale (ed), *The Employment Relationship: A Comparative Overview* (London, Palgrave Macmillan, 2011); Kamala Sankaran, ‘Flexibility and Informalisation of Employment Relationships’ in Judy Fudge, Kamala Sankaran and Shae McCrystal (eds), *Regulating Work: Challenging Legal Boundaries* (Oxford, Hart, 2012); R Agarwala, *Informal Labour, Formal Politics and Dignified Discontent in India* (Cambridge, Cambridge University Press, 2013); Dibyendu Maiti, ‘Precarious Work in India: Trends and Emerging Issues’ (2013) 57 *American Behavioral Scientist* 507.

²⁶ Jütting and de Laiglesia, *Is Informal Normal?* (n 3).

²⁷ Visser, ‘A Floor to Exploitation?’ (n 3) at 5, citing Visser, *Race, Poverty, and State Intervention in the informal Economy: Evidence from South Africa* (New York, New School University 2011). On informalisation in the global north, see further Colin C. Williams and Frédéric Lapeyre, ‘Dependent Self-Employment: Trends, Challenges and Policy Responses in the EU,’ International Labour Office, Employment Policy Department, Working Paper No. 228, 2017. On Japan and South Korea, see Fang Lee Cooke and Yumei Jiang, ‘The Growth of Non-Standard Employment in Japan and South Korea: The Role of Institutional Actors and Impact on Workers and the Labour Market’ (2017) 55 *Asia Pacific Journal of Human Resources* 155. On Norway, see John Fredrik Rye, ‘Negotiating

An intriguing element of the more recent academic work, in this regard, is that it is beginning to engage much more energetically with the regulatory conduits to informalisation. The informality literature has often been received, with justification, as adrift from the preoccupations of legal scholarship: identified and elaborated primarily by economists; ill-suited and neglectful of the intricacies, objectives, and structures of labour regulation.²⁸ La Hovary, centrally, has voiced dissatisfaction with the concept of the informal economy and cast doubt on its promise for effective policy intervention.²⁹ Yet the evolution of the informality narrative has the potential to illuminate the present regulatory era, precisely because it is approaching with more rigour and precision the relationship between formality and informality and the channels that link them. Two insights from the literature are particularly useful for conceptualising informalisation: that informality exists on a continuum, and that legal regulation mediates the shifting boundaries between the formal and informal.

3.1 Informality as a continuum

The trajectory in the informality literature is towards an extended, more probing, destabilisation of the dichotomy of the formal and informal. The resultant imagery is of informality as existing on a continuum in which working relationships are compliant with certain legal sub-fields, or specific obligations, but not others.³⁰ Along this continuum, there is an increasingly restricted engagement with regulatory obligations and requirements and an increasingly inhibited access to a range of legal protections and entitlements - in the labour dimension, protection from arbitrary dismissal, for example, work/family entitlements, rights to equality, to organise, and collectively to bargain, social security benefits, training opportunities etc.³¹

These observations may appear fairly mundane, at first glance, from the vantage point of labour law scholarship. The uneven protection offered by labour and social protection frameworks has long been highlighted in the literatures on non-standard work and precariousness. This literature has unfurled, at least in part, as 'gap analyses' that have

Neoliberalism: Informalisation and Reformalisation of Industrial Relations in Norway's Agricultural Industry in the 21st Century' (2017) 32 *Population, Space and Place*. On the UK, see Sam Scott 'Informalisation in Low-wage Labour Markets: A Case Study of the UK Food Industry' (2017) *Population, Space and Place*. See also Chen, 'Rethinking the Informal Economy' (note 4) at 5.

²⁸ Claire La Hovary 'The Informal Economy and the ILO: A Legal Perspective' (2014) 4 *International Journal of Comparative Labour Law and Industrial Relations* 391.

²⁹ Ibid.

³⁰ Visser 'A Floor to Exploitation?' (n 3) at 5, citing Jamie Peck and Nik Theodore, 'Politicizing Contingent Work: Countering Neoliberal Labour-Market Regulation...From the Bottom Up?' (2012) 111(4) *South Atlantic Quarterly* 741.

³¹ Williams et al have applied this model to an investigation of South-East European countries by drawing on data from a 2007 Eurobarometer survey, Colin C. Williams, Abbi Kadir, Sara Nadin and Tim Vorley, 'Evaluating the Extent and Nature of the Informalization of Employment Relations in South-East Europe' (2013) 19(2) *European Journal of Industrial Relations* 91. This framework, however, is centred primarily on the extent of firm declaration to regulatory authorities, therefore capturing primarily the overlap of formality and informality in which workers are paid two distinct wages (the officially declared wage and an undeclared counterpart), at 94).

mapped uneven coverage, exiled workers, and lost protections in higher-income countries.³² The informality literature, however, has a particular vigour in unveiling the complex dependencies between the realms of formality and informality, their dynamic interaction, and the repercussions for legal standards and worker protection across the economy as a whole.³³ Visser's recent analysis is particularly adept,

[T]hese 'economies' are not distinct separate spheres of economic activity. Rather, they are engaged in a complex dialectical relationship through which a structural dependency is continuously constructed and reinforced by labour and material supply chains facilitated under policy and market practices that promote deregulation in the formal economy. The formation of these supply chains, in turn, induce the expansion of the informal economy which manifests in increased levels of employment 'informality' or 'precarity' in the formal labour market and results in the embedding of informal labour markets and economic activity within the formal economy.³⁴

3.2. Legal regulation as mediating the informality boundary

Relatedly, as Sassen noted comparatively early in the debates, 'the informal economy can only be understood in its relation to the formal economy.'³⁵ Informality can be identified, that is, only because there exists an institutional framework for economic activity through which the state regulates working relations.³⁶ Sassen's observation serves, first, further to reinforce that informal economies are not distinct economic spheres: they are '[d]eeply embedded within the formal economy and socially and legally regulated by a battery of social institutions.'³⁷ Second, this analysis emphasises that it is legal regulation, including labour law frameworks, that mediate the ragged boundary between the informal and formal dimensions of working relationships.

The latter insight is particularly valuable for conceptualising the mechanisms of informalisation that channel workers from formality to informality, which need to be identified in detail and with precision. Lacunae or deficiencies in regulatory regimes and institutions shape the formality/informality boundary. Legislation permits, facilitates, or neglects paths to worker protection, and formal employers devise strategies that respond to these regulatory prompts. The scholarship points in particular to externalisation strategies - in their myriad forms - as a central conduit to informalisation: hiring on a casual basis, for example, outsourcing or sub-contracting to small firms or home-based workers, securing

³² eg Sandra Fredman, 'Labour Law in Flux: The Changing Composition of the Workforce' (1997) 26(4) *Industrial Law Journal* 337-352; Leah Vosko (ed) *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal, McGill-Queen's University Press, 2000); Judy Fudge and Rosemary Owens (eds), *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Oxford, Hart, 2006); Deirdre McCann *Regulating Flexible Work* (Oxford, Oxford University Press, 2008); Vosko *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment* (Oxford, Oxford University Press, 2010).

³³ Visser, 'A Floor to Exploitation' (n 3).

³⁴ Ibid, at 4.

³⁵ Saskia Sassen, 'Informalization in Advanced Market Economies,' Issues in Development Discussion Paper 20 ILO 1999, 2.

³⁶ Ibid.

³⁷ Ibid at 4.

labour through temporary agency or labour-hire arrangements, or tolerating or facilitating false self-employment.³⁸ Relatedly, the scope of coverage of protective labour legislation, and in particular fealty to traditional conceptions of the employment relationship, deprive workers of legal recognition or protection where the employment relationship is either disguised or an ill-fit with conventional models.³⁹ Other conduits include the failure of legislative frameworks adequately to incorporate dispersion of the responsibilities of employment among multiple entities, the punitive intersection of regulatory fields, notably labour and immigration laws,⁴⁰ and ineffective enforcement regimes.⁴¹

The guiding contemporary notion of informality, then, loops together the regulatory dimensions of precariousness, in particular where it manifests in non-standard work, deficiencies in the implementation and enforcement of labour laws, and the intersection of regulatory regimes. The research on informality is therefore paralleling advances in the labour regulation literatures in producing a holistic picture of labour law's uncertain or deficient outcomes. Most notably, the notion of 'regulatory indeterminacy'⁴² is playing a parallel role, including as it has been elaborated to identify and to link key drivers of the indeterminate impacts of labour regulation, identified as fragmentation, institutional interactions, and enforcement efficacy.⁴³ This complexity renders the concept of informality inevitably challenging to operationalise for statistical measurement and comparison, as Deakin et al argue in this volume.⁴⁴ Yet the notion is nonetheless valuable at the conceptual and policy levels, to clarify the regulatory conduits to informality and to fashion suitably expansive and coherent policy responses.

Towards such policy interventions, these insights are revealing how legal frameworks shape the incidence and texture of informality. Yet they also suggest that legal regimes can be designed to curb or to alleviate the detrimental outcomes that are associated with informal work. It is evident, for example, that countries at similar income-levels exhibit significant variations in the incidence of informality.⁴⁵ These varying outcomes suggest the need for an attentiveness to the policy mix, including to the role of the state in generating and preventing informalisation. In this regard, informalisation can be conceived of as a

³⁸ M. Vanamala, 'Informalisation and Feminisation of a Formal Sector Industry: A Case Study' (2001) 36(2) *Economic and Political Weekly* 2378-2383+2385-2389; Standing, *Global Feminisation* (n 19); Theron, 'Informalisation from Above' (n 22); Peck and Theodore, 'Politicizing Contingent Work' (n 30); Webster et al, 'Informalization and Decent Work' (n 24).

³⁹ Chen 'Rethinking the Informal Economy' (note 4) at 8.

⁴⁰ Peck and Theodore 'Politicizing Contingent Work' (n 30) at 753.

⁴¹ See eg Leah F. Vosko, John Grundy, and Mark P. Thomas, 'Challenging New Governance: Evaluating New Approaches to Employment Standards Enforcement in Common Law Jurisdictions' (2016) 37(2) *Economic and Industrial Democracy* 373.

⁴² Simon Deakin and Prabirjit Sarkar, 'Assessing the Long-Run Economic Impact of Labour Law Systems: A Theoretical Reappraisal and Analysis of New Time Series Data' (2008) *Industrial Relations Journal* 453.

⁴³ Sangheon Lee and Deirdre McCann, 'Regulatory Indeterminacy and Protection in Contemporary Labour Markets: Innovation in Research and Policy' in Deirdre McCann, Sangheon Lee, Patrick Belser, Colin Fenwick, John Howe and Malte Luebker (eds), *Creative Labour Regulation: Indeterminacy and Protection in an Uncertain World* (Geneva, ILO/Palgrave, 2014) 3.

⁴⁴ Simon Deakin, Shelley Marshall, and Sanjay Pinto, 'Labour Laws, Informality, and Development: Comparing India and China' [IN THIS VOLUME].

⁴⁵ Sangheon Lee and Deirdre McCann 'Measuring Labour Market Institutions: Conceptual and Methodological Questions on "Working Hours Rigidity"' in Janine Berg and David Kucera (eds), *In Defence of Labour Market Institutions: Cultivating Justice in the Developing World* (Geneva, ILO and Palgrave MacMillan, 2008).

process, often in flux, and channelled through diverse conduits. This process is not inevitable, but can be shaped, tempered, or reversed by regulatory intervention. It is crucial, then, to track the regulatory and institutional activity that engineers informalisation, and to craft policy measures that adequately respond. It is with this objective in mind that the key international regulatory policy responses - by the World Bank and ILO - are evaluated in the following Section.

4. INFORMALISATION IN INTERNATIONAL REGULATORY POLICY

Given the evolving conceptions of informality traced in the previous Section, it is worth investigating the regulatory supports for informalisation are reflected in key policy discourses. To that end, this Section examines the most significant renditions of informalisation that are conveyed in international policy discourses. In this regard, the international is understood as a crucial site in which informality is conceptualised and the mechanisms to tackle it are constructed. The regulatory policy sites under consideration are the pivotal international spheres of the World Bank and the International Labour Organization (ILO). This Section builds on earlier work that has argued that the relationship between these institutions should be understood as a dynamic process of institutional convergence and divergence that is generating a conversation about the objectives, format and tenor of labour market regulation.⁴⁶ The objective is to trace evolving notions of informalisation within broader narratives of informality; to investigate how these discourses capture and convey the nature and dynamics of informalisation; and in particular to highlight how each conveys the role of legal regulation. The Section is based on a review of the recent outputs of each of these transnational actors, with a particular focus on the evolving influence of the 'plateau model' of labour regulation developed in the World Bank's *World Development 2013*, in particular in the Bank's *Doing Business* project, and on ILO Recommendation No. 204 and the formalisation strategy that it embodies.

4.1 Informalisation on the regulatory plateau: the World Bank

Until recently, World Bank discourses on labour regulation strictly adhered to a dualist model of formal and informal work. The Bank's regulatory policy has in recent decades primarily been associated with the *Doing Business* initiative - a set of indicators that measure and compare various elements of 'business regulation' in 190 countries, the results of which have been disseminated through a series of annual reports since 2003.⁴⁷ The project engages with labour regulation through a Labour Regulation Index - previously the Employing Workers Index - which measures and compares select labour protections (e.g. hiring, working hours, redundancy). Conventionally, as has been elaborated elsewhere, the policy discourse associated with *Doing Business* has conveyed labour regulation to float adrift from a discrete informal economy.⁴⁸ A pessimistic account of labour law's promise relayed a clear-cut

⁴⁶ Deirdre McCann, 'Labour Law on the Plateau: Towards Regulatory Policy for Endogenous Norms' in Alan Bogg, Anne Davies, and Jeremias Prassl (eds) *The Autonomy of Labour Law* (Oxford, Hart, 2015).

⁴⁷ World Bank, *Doing Business 2004: Understanding Regulations* (Washington DC, World Bank, 2003).

⁴⁸ Janine Berg and Sandrine Cazes, 'Polymaking Gone Awry: The Labor Market Regulations of the Doing Business Indicators' (2008) 29(4) *Comparative Labor Law & Policy Journal* 349-381; Sangheon Lee and Deirdre McCann, 'The Impact of Labour Regulations: Measuring the Effectiveness of Legal Norms in a Developing Country' in Lee and McCann (eds), *Regulating for Decent Work: New Directions in Labour Market Regulation* (Geneva, Palgrave MacMillan/International Labour Office, 2011); McCann 'Labour Law on the Plateau' (n 46).

dichotomy between ‘formal’ and ‘informal’ economies.⁴⁹ One consequence was the characterisation of rigid labour regulation as driving workers into the informal economy; another, the assumption that labour standards are unknown or entirely irrelevant to informal workers.⁵⁰ Informalisation within formal settings was therefore largely overlooked: an ‘informal sector’ was assumed and the informal workforce identified with that domain.

The World Bank’s imagery of labour regulation has been refined since the limitations of the *Doing Business* initiative prompted reform of the project.⁵¹ With the Employing Workers Index (EWI) widely discredited for its conceptual and methodological limitations, the Bank showcased a new approach. A ‘plateau’ imagery was pioneered in the 2013 *World Development Report (WDR2013)*.⁵² The Report identified twin risks - that labour regulations may be either too rigid or too lax - and contended that both can have detrimental effects.⁵³ An appropriate level of labour regulation is, instead, situated on a ‘plateau’ between excessive and lax labour regulation: “[l]abour policies that are not to undermine job creation, while maximizing development payoffs from jobs, must remain on this plateau.’ The plateau model was an important reset of the Bank’s frequently hostile engagement with labour regulation.⁵⁴ *WDR2013* acknowledged research findings that labour laws do not inhibit job creation, entertained alternative explanations for poor employment outcomes, and acknowledged the benefits of legal regulation, including social objectives such as improved living standards and social cohesion.⁵⁵ The outcry about the *Doing Business* methodology also prompted the Bank to rebrand the EWI as the Labour Regulation Index (LRI) and to incorporate questions on protective regulations (‘job quality’): on equal remuneration for work of equal value, measures to combat gender discrimination in hiring, maternity leave, paid sick leave, and unemployment protection.⁵⁶ Insofar as ‘balance’ is a proxy for effective regulation, the quest for the regulatory plateau is welcome and has potential to illuminate efforts to conceptualise the regulatory dimensions of informalisation. In this respect, the Bank’s policy discourse parallels a central objective of the recent labour regulation literature: properly to conceptualise and to gauge the effectiveness of regulatory frameworks, including their role in generating and sustaining informality.⁵⁷ Yet the plateau model has not been absorbed uniformly across the Bank’s labour regulation policy discourses.

In the *Doing Business* project, at the rhetorical level the language of ‘balance’ is sustained: ‘[t]he challenge in developing labour policies is to avoid the extremes of over and

⁴⁹ See, for example, World Bank *Doing Business 2006* (Washington, DC, World Bank 2005); see further Lee and McCann, ‘The Impact of Labour Regulations’ (n 48).

⁵⁰ World Bank, *ibid*.

⁵¹ See McCann, ‘Labour Law on the Plateau’ (n 46).

⁵² World Bank *World Development Report 2013: Jobs* (Washington DC, World Bank, 2012).

⁵³ *Ibid*, p. 258.

⁵⁴ See further McCann, ‘Labour Law on the Plateau’ (n 46).

⁵⁵ World Bank, *World Development Report 2013* (n 52), at 22.

⁵⁶ World Bank *Doing Business 2016* (Washington DC, World Bank, 2015), at 159-160, *Doing Business 2017* (Washington DC, World Bank 2016), at 161-162. *Doing Business 2016* included four questions that are not present in the 2017 report, on the availability of on-the-job training; whether an employee can create or join a union; the availability of administrative or judicial relief where there has been infringement of employees’ rights; the and availability of a labour inspection system, *Doing Business 2016*, at 160.

⁵⁷ eg Sangheon Lee and Deirdre McCann Lee, ‘New Directions in Labour Regulation Research,’ in Lee and McCann, *Regulating for Decent Work: New Directions in Labour Market Regulation* (Geneva, Palgrave Macmillan/ILO, 2011; McCann and Fudge, ‘Strategic Regulation’ (n 10).

under-regulation by reaching a balance between worker protection and flexibility.⁵⁸ An examination of the post-*WDR2013* era evolution of this project, however, shows its fidelity to the plateau model to be uneven and poorly absorbed into the LRI methodology, including in relation to informality. Most fundamentally, there is no recognition that informality spans a continuum: the rendition of dichotomous informality and formality remains strikingly intact.⁵⁹ A central role for regulation in generating informality, further, is present, but it is 'rigid' labour regulation that continues to be identified as the culprit. Employment protection laws in particular are conveyed almost exclusively as drivers of labour market segmentation, relying on a small number of studies.⁶⁰

On the methodological level, the LRI is not attuned to capturing either the dynamics of informalisation or the legal mechanisms that are being tested to reorient these processes. Legal frameworks in fields other than labour law and social protection, are beyond the Index's scope. It cannot, therefore, capture the diversity of legal regimes that regulate labour markets. Inevitably missing, in particular, is the harsh logic of the immigration frameworks that channel migrant workers into informal work.⁶¹ Even within the conventional parameters of labour law, however, the *Doing Business* methodology does not capture the regulatory supports of informalisation. The 2017 Report reverts to the evaluation of national labour regulation frameworks, following a post-reform hiatus in which the LRI findings were relayed without comment.⁶² The Report's - laudable - conclusion is that regulation should be tailored to national circumstances and designed in collaboration with the social partners.⁶³ The return to an evaluative strategy, however, purports to demonstrate the association of labour regulation with informal employment and unregistered firms⁶⁴ (including through a reversion to the original nomenclature of a 'rigidity of employment regulation' index).⁶⁵ This outcome is realised through a scoring system that has presumably been in abeyance since the reform of *Doing Business*, although it is not elaborated in detail in the Report.

Yet despite the tenor of these conclusions, the LRI and the associated literature miss much of how regulation sustains informality, and, most pertinently for present purposes, channels informalisation. Elements can be singled out that are both central to the deficiencies of this project and of broader significance for the exploration of the regulatory dimensions of informalisation in international labour policy. First, the LRI is oriented towards

⁵⁸ World Bank, *Doing Business 2017* (note 56) at 87.

⁵⁹ See the discussion of employment protection legislation on p 87, referring to 'dual labour markets, whereby a labour force becomes segmented into formal versus informal sector workers (in developing economies)....' Ibid.

⁶⁰ Ibid, citing Simeon Djankov and Rita Ramalho, 'Employment Laws in Developing Countries,' Centre for Economic Policy Research (CEPR) Discussion Paper No. DP7097, December 2008; Siddharth Sharma, 'Entry Regulation, Labor Laws and Informality,' Working Paper 48927, World Bank, 2009; Norman V Loayza, Ana Maria Oviedo and Luis Servén, 'The Impact of Regulation on Growth and Informality - Cross-Country Evidence,' Policy Research Working Paper, WPS 3623, World Bank, 2005.

⁶¹ eg Working Lives Research Institute, 'Study on Precarious Work and Social Rights. Study carried out for the European Commission,' VT/2010/084 (Working Lives Research Institute, London Metropolitan University, 2012).

⁶² World Bank *Doing Business 2017* (n 56), Annex: Labour Market Regulation, pp 87-95.

⁶³ Ibid, at 87.

⁶⁴ Ibid, at Figures 10.1, 10.2, pp 88-89.

⁶⁵ Defined as the average of four sub-indices - hiring, working hours, redundancy rules and cost. See ibid eg Figure 10.1, p 88.

substantive standards - hours limits, rest periods, annual leave, redundancy protections, equal pay, maternity leave etc.⁶⁶ The Index therefore misses central features of labour regulation frameworks, highlighted in Section 3.2 that are associated with informalisation. These tend to be found in the minutiae of labour law texts, rather than in their flagship protections. The LRI does not, for example, capture exclusions from protection, explicit or implicit. Nor does it, centrally, capture the personal scope of legal measures, typically tied to the presence of a judicially-endorsed 'contract of employment' and therefore elusive for many workers.⁶⁷

Second, and linked to the project's tilt towards the substantive, *Doing Business* is unable to capture the crucial role of non-standard work regulation in propelling workers towards the informality continuum. In this regard, the Bank's thin rendition of informality hosts a supplementary dichotomy: between formal and informal workers in developing countries and 'permanent' and 'contingent' workers in high-income economies.⁶⁸ This account inevitably misses the parallel processes of informalisation in lower- and higher-income countries, and the degree to which informality manifests as non-standard work in both.

This deficiency crystallises in *Doing Business's* treatment of fixed-term contracts, the only non-standard work-form that is tracked by the LRI. The hiring sub-index captures (1) the extent to which employers can hire workers on a fixed-term basis to perform permanent tasks and (2) the maximum duration of fixed-term contracts (including renewals).⁶⁹ The Index is again assumed to capture rigidity; the merits of widespread fixed-term contracting is assumed.⁷⁰ The 2017 *Report* asserts the potential of fixed-term contracts to enhance the employability of labour market entrants, particularly young workers, through providing experience and access to professional networks.⁷¹ There is little effort to convey the downside of short-term work,⁷² or to quantify or compare the protections increasingly available to fixed-term workers in countries across the world: mandated maximum durations/renewals, for example, equal treatment, or conversion rights to open-ended contracts.

Doing Business also continues to miss the actual strength of labour regulation, thus remaining open to the criticisms that have endured from the outset of the project about the Index's failure to accommodate the observance of legal standards.⁷³ In particular, the LRI does not capture enforcement - an enduring omission, long noted,⁷⁴ central to the *Doing Business* reforms and touching on key elements of informality. Questions, further, that might offer some insight into informality channels were dropped in the 2017 report, on the availability of

⁶⁶ The key exception is in the treatment of redundancy, which captures procedural requirements, but not exclusions from protection, *ibid*, at 161.

⁶⁷ That the worker subject to legal rules is an employee is a feature of the project's 'assumptions about the worker,' *ibid*, at 160.

⁶⁸ *Ibid*, at 87.

⁶⁹ *Ibid*, at 161.

⁷⁰ *Ibid*, at 88.

⁷¹ *Ibid*, at 88-89, citing OECD *Employment Outlook 2014* (Paris, OECD, 2014).

⁷² *cf* Arvo Kuddo, David Robalino, and Michael Weber, *Balancing Regulations to Promote Jobs: From Employment Contracts to Unemployment Benefits* (Washington, DC, World Bank 2015), 2-3.

⁷³ Lee and McCann, 'Measuring Labour Market Institutions' (n 45).

⁷⁴ *ibid*.

administrative/judicial relief where employees' rights have been infringed and the presence of a labour inspection system.⁷⁵ As a result, the Index risks inaccurate conclusions about the impacts of labour laws, including on informal work.

While the extensive and punctual annual outputs of the *Doing Business* project tend to overshadow alternative narratives of labour regulation that emanate from the Bank, these periodically surface. The key comparator is *WDR2013* and the literature that takes it as a point of departure. One is the 2015 report on *Balancing Regulations to Promote Jobs* ('the *Balancing* report'), which emanates from the Bank's Social Protection, Labor and Jobs realm and was produced in consultation with the ILO, International Trade Union Confederation and International Organization of Employers.⁷⁶ The analyses that characterise this line of the Bank's work have a more refined and expansive grasp of the regulatory dynamics of informalisation. *WDR2013*, for example, catches the *de jure* routes to informality, listing the features of legal frameworks that preclude protected status: exceptions - of domestic workers, small enterprises, export zones; the complexities of regulating multilateral working relationships; and limited access to adjudication mechanisms.⁷⁷ The *Balancing* report also recognises the significance of non-standard work regulation, capturing key regulatory conduits and certain of the measures that are being trialled to reorder them.⁷⁸ The report advocates protective regulatory frameworks for non-standard workers⁷⁹: legislation that entitles temporary and part-time workers to protections equivalent to full-time workers,⁸⁰ restrictions on the use of fixed-term contracts (citing ILO Convention No. 166 on preventing abusive recourse to fixed-term work),⁸¹ legislation to combat disguised employment,⁸² and requirements that employees receive written employment contracts.⁸³

4.2. The formalisation paradigm: the ILO

ILO policy discourses on the informal economy have been attuned to the presence of informality in formal enterprises since the language of the 'informal sector' was replaced by the 'informal economy' at the turn of the century.⁸⁴ As discussed in Section 3, a job-centred definition of informality was enshrined in the ILO's 2002 *Resolution and Conclusions concerning decent work and the informal economy* since incorporated in the International Conference of Labour Statisticians (ICLS) 2003 *Guidelines concerning a statistical definition of*

⁷⁵ Both were included in *Doing Business 2016*; see n 56 above.

⁷⁶ Kuddo et al (n 72).

⁷⁷ World Bank, *World Development Report 2013* (n 52), at 156.

⁷⁸ Kuddo et al (n 72), ch 1. *WDR2013* was weaker on non-standard work, offering few suggestions, for example, on the regulation of multipartite relationships, see McCann, 'Labour Regulation on the Plateau' (n 46).

⁷⁹ Kuddo et al (n 46), at 4, citing ILO Employment Relationship Recommendation, 2006 (No. 198).

⁸⁰ *ibid.*

⁸¹ The illustrations are limiting recourse to a specified period to cases in which, owing to nature of work or circumstances under which it is to be effected, or the interests of worker, the employment relationship cannot be of indeterminate duration; deeming contracts for a specified period to be contracts of employment of indeterminate duration; deeming contracts for a specified period that are renewed on one or more occasions to be contracts of employment. *Ibid.*

⁸² Although with a curious definition that is confined to trilateral relationships; *ibid.*, note 23.

⁸³ *Ibid.*

⁸⁴ Section 3 above.

*informal employment*⁸⁵ and, ultimately, the Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204). This job-centred model, capturing economic activities that are insufficiently covered by formal arrangements in law or practice,⁸⁶ always implicitly extended to formal-site informality, made explicit in the Recommendation's coverage of 'employees holding informal jobs in or for formal enterprises.'⁸⁷

Evaluating the ILO instruments by drawing on the insights on the regulatory dimension of informality elaborated in Section 3 confirms their value in transmitting sophisticated conceptions of informality to the international labour policy arena. The ILO policy discourses embody the two insights highlighted in Section 3. First, they are alive to the continuum between the formal and the informal. Most strikingly, in the 2002 *Resolution* even the more expansive job-centred concept of the informal economy is conveyed as tending 'to downplay the linkages, grey areas and interdependencies between formal and informal activities.'⁸⁸ Second, legal frameworks are recognised to govern the uneven boundary between formal and informal work, emphasising the crucial role of domestic legal regimes.⁸⁹

The ILO policy discourses are explicit in recognising informality as a problem of governance:

Informality is principally a governance issue. The growth of the informal economy can often be traced to inappropriate, ineffective, misguided or badly implemented macroeconomic and social policies, often developed without tripartite consultation; the lack of conducive legal and institutional frameworks; and the lack of good governance for proper and effective implementation of policies and laws.⁹⁰

The ILO instruments also capture the diversity of the modes and forms of regulatory escape that are generated at this boundary. The 2003 *Guidelines* are most elaborate, incorporating a list that includes non-declaration of jobs or employees, casual and temporary employment, working hours or wages below legal thresholds, work at home or beyond the premises of the employer, and jobs to which labour laws 'are not applied, not enforced, or not complied with for any other reason.'⁹¹ The Recommendation's scope provisions add explicit references to both individuals in subcontracting and supply chains⁹² and workers in 'unrecognized or unregulated' employment relationships.⁹³ The 2002 Resolution, most expansively, alludes to 'grey areas' in which the economic activity involves characteristics of

⁸⁵ International Conference of Labour Statisticians (ICLS) 2003 *Guidelines concerning a Statistical Definition of Informal Employment* (ILO 2003).

⁸⁶ Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204), para 2(a).

⁸⁷ Ibid, para 4(c) (also in the 2003 *Guidelines* (n 16), para 5(i)).

⁸⁸ ILO *Resolution concerning Decent Work and the Informal Economy* (n 17), para 3.

⁸⁹ '[S]ince a defining characteristic of workers and enterprises in the informal economy is that they often are not recognised, regulated or protected by law, the legal and institutional frameworks of a country are key.' Ibid, para 16.

⁹⁰ The 2015 Recommendation is less assertive, noting informality 'has multiple causes, including governance and structural issues...' (Preamble).

⁹¹ International Conference of Labour Statisticians (n 16), para 3(5).

⁹² Recommendation No. 204 (n 86), para 4(c).

⁹³ Ibid, para 4(d).

both the formal and informal economy, such as workers in formal enterprises whose wages and working conditions are typical of those in informal work.⁹⁴

Processes of informalisation, however, were not central to the 2002 *Resolution*. Recommendation No. 204 is therefore pioneering in including preventing the informalisation of formal economy jobs among its key objectives.⁹⁵ Embracing the prevention of informalisation as an integral element of the formalisation project is a key contribution of the Recommendation that should not be understated. The preventive objective strengthens research and policy conceptualisations of the nature and dynamics of informality and is available to shape global renditions of formalisation. Given its far-reaching potential, it is not surprising that the inclusion of this objective in the Recommendation was contested. The preparatory documents reveal that the objective was incorporated through an amendment to the International Labour Office proposed Conclusions that were deliberated upon by the Committee on Transitioning from the Informal Economy at its first discussion in 2014. Proposed by the Worker Vice-Chairperson, the amendment was opposed by the Employer counterpart on the grounds that the existing text was sufficient,⁹⁶ highlighting that the stance of the international employer lobby would have precluded informalisation as an element of domestic formalisation policies.⁹⁷

The Recommendation is also robust on the breadth and mix of the policy response to informality, including to informalisation. In this regard, labour regulation can only be an element in a range of policy arenas that must be engaged to improve or discourage informal working relations. The Recommendation stresses the need for coherence and coordination across a wide range of policy fora including macroeconomic, employment, and social protection policies.⁹⁸ Related ILO literature has also captured the role of formalisation strategies and legal regulation in a crafted policy mix that embraces macro-economic, monetary, financial sector, exchange rate, and public investment policies and favours job creation in the formal economy, structural shifts to higher productivity activities, and labour markets policies and institutions that enable transitions to formality.⁹⁹

⁹⁴ ILO *Resolution concerning Decent Work and the Informal Economy* (n 17), para 5.

⁹⁵ This aim is enshrined among a trilogy of key objectives in para 1(c), 'Objectives and Scope,' together with facilitating the transition of workers and economic units from the informal to the formal economy 'while respecting workers' fundamental rights and ensuring opportunities for income security, livelihoods and entrepreneurship' (1 (a)); and promoting enterprises and decent jobs in the formal economy and the coherence of macroeconomic, employment, and social policies (1(b)).

⁹⁶ It was also opposed by the Africa Group of governments, see *Report of the Committee on the Transition from the Informal to the Formal Economy: summary of proceedings*, available at www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_375370.pdf, paras 734-41.

⁹⁷ The International Organization for Employers (IOE) had earlier objected to the inclusion of the 'informal in the formal' in the standard-setting exercise. See La Hovary, 'The Informal Economy and the ILO,' (n 28) at 407-408, citing IOE *Proposed New ILO Standard(s) - Informal Economy* (Geneva, IOE, 2013), 6.

⁹⁸ Paras 1, 7(d). It also calls for an 'integrated policy framework...included in national development strategies...as well as in poverty reduction strategies and budgets....,' para 9.

⁹⁹ eg ILO 'Informality and the Quality of Employment in G20 Countries,' Report prepared for the G20 Labour and Employment Ministerial Meeting, Melbourne, Australia, 10-11 September 2014, available at www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_305425.pdf, 8-9.

Labour regulation initiatives that have the potential to curb informalisation are included in the Recommendation. These respond to the legislative mechanisms and employer strategies that generate and sustain pockets of informality. Governments, first, are called upon to ensure that workers are covered by labour laws. The Recommendation prompts ILO members to adopt, review, and enforce legal measures to ensure appropriate coverage and protection of all workers and economic units.¹⁰⁰ Effective enforcement - part-constitutive of the parameters of informality in the job-centred model - is also extensively treated. States are encouraged to address avoidance of labour laws,¹⁰¹ to ensure recognition and enforcement of employment relationships,¹⁰² to strengthen inspection,¹⁰³ to provide information and assistance on legal compliance,¹⁰⁴ and to establish efficient and accessible complaint procedures.¹⁰⁵ The Recommendation, third, calls for states to realise the fundamental principles and rights¹⁰⁶ and ensure health and safety protections in informal work,¹⁰⁷ progressively extend social security, maternity protection, decent working conditions and a minimum wage to informal workers,¹⁰⁸ and encourage the provision of affordable childcare and other care services.¹⁰⁹ These recommendations are relevant to tackling informalisation, since parity of entitlements would curb the incentives associated with resorting to precarious forms of work.

The Recommendation, further, does not betray the hesitancy about the international labour standards that has become characteristic of the ILO's flagship policy discourses during the last decade.¹¹⁰ Recommendation No. 204 has a fairly robust embrace of the ILO standards, requesting member States to take into account a range of instruments that are listed in an Annex.¹¹¹ Particularly useful, in this regard, is the presence of 'non-standard work' standards: the Private Employment Agencies Convention, 1997 (No. 181), which requires a degree of protection - albeit unambitious - for temporary agency workers¹¹²; the Employment Relationship Recommendation (2006) No. 198 - again flawed, but nonetheless a source of some guidance on the regulatory dimension of the formalisation project¹¹³; and the Home Work Convention, 1996 (No. 177) and Domestic Workers standards,¹¹⁴ both essential

¹⁰⁰ Recommendation No. 204 (n 86), para 9. As part of ensuring compliance with national laws and regulations, states are also encouraged to ensure the recognition and enforcement of employment relationships, para 26.

¹⁰¹ Ibid, para 22. The Recommendation also highlights a need to prevent and sanction deliberate avoidance of, or exit from, the formal economy to evade taxation and labour laws, para 7(l).

¹⁰² Ibid, para 26.

¹⁰³ Ibid, para 27.

¹⁰⁴ Ibid, paras 28-29.

¹⁰⁵ Ibid, para 29.

¹⁰⁶ Ibid, para 16.

¹⁰⁷ Ibid, para 17.

¹⁰⁸ Ibid, para 18.

¹⁰⁹ Ibid, para 21.

¹¹⁰ McCann, 'Labour Regulation on the Plateau' (n 46).

¹¹¹ Para 7(g). These standards do not include the Hours of Work Conventions.

¹¹² Convention No. 181 primarily preserves the rights to freedom of association and to bargain collectively (para 4), prohibits discrimination (para 5(1)), and requires signatories to provide 'adequate protection' in relation to a list of entitlements (para 11).

¹¹³ The most convincing aspect of the Recommendation is the suggestion that governments mandate a legal presumption that an employment relationship exists where one or more indicators is present, para 11(b).

¹¹⁴ Domestic Workers Convention, 2011 (No. 189) and Recommendation (No. 201). Both home work and domestic work are classified as 'specific categories of workers' in the Annex to Recommendation No. 204. On the potential for legal frameworks on domestic work to offer lessons for labour-protective formalisation

references for formalisation policies targeting crucial harbours of protective frailty in the global economy.¹¹⁵

The Recommendation is not equally convincing, however, on what can be achieved by using such legal frameworks and techniques to combat informalisation. While preventing the unravelling of formal jobs is among the Recommendation's objectives, the mechanisms that might stem the slide into informality are sparsely elaborated. Yet the regulatory options are numerous, diverse, and available for testing at local levels:¹¹⁶ equal treatment mandates, specific allocation of legal obligations in multilateral relationships, explicit distribution of responsibilities across value chains, restricting outsourcing or mandating protections for the outsourced workforce, working time techniques that limit fragmentation or that promote certainty in scheduling and wages, and specific protections for the range of forms of temporary, casual or multilateral work.

To some degree, this limitation reflects that the Recommendation references the non-standard work standards without fully absorbing the regulatory strategies that these instruments demand. The equal treatment model is a case in point. It has been observed that the Recommendation encourages the progressive extension of decent working conditions to informal economy workers.¹¹⁷ Yet one obvious route to this goal is an equality mandate that demands parity of treatment between non-standard and standard workers. One of the key models developed to ensure that non-standard working relationships - part-time, fixed-term, temporary agency - match the quality of standard-form jobs, the equality model, is being tested in legal frameworks across the world.¹¹⁸ This approach, further, is particularly apt for the dual-track complexion of formal-site informality, in which the differential treatment is accented by proximity. As the international spearhead of the equal treatment model,¹¹⁹ the Home Work Convention could have been drawn on to support a more expansive endorsement of the equal treatment model. This opportunity was neglected, however. Nor is the Part-Time Work Convention, 1994 (No. 175) included in the Recommendation's Annex, although it elevated the equality approach to an economy-wide model and targets a core mode of fragmentation, through shortened hours.¹²⁰

In this regard and more broadly, Recommendation No. 204 parallels the World Bank literature by assuming the centrality of substantive protections. This point is further

strategies see Deirdre McCann and Jillian Murray, 'Prompting Formalisation Through Labour Market Regulation: A "Framed Flexibility" Model for Domestic Work' (2014) 43(3) *Industrial Law Journal* 319.

¹¹⁵ McCann and Murray, *ibid*.

¹¹⁶ On testing as a strategy, see Lee and McCann 'New Directions in Labour Regulation Research' (n 57).

¹¹⁷ Para 18. Working time standards are notably absent.

¹¹⁸ On the UK, for example, see McCann *Regulating Flexible Work* (n 32); Lisa Rodgers, *Labour Law, Vulnerability and the Regulation of Precarious Work* (Cheltenham, Edward Elgar, 2016) ; on Korea, see JooHee Lee, 'More Protection, Still Gendered: The Effects of Non-standard Employment Protection Acts on South Korean Women Workers' (2017) 47(1) *Journal of Contemporary Asia* 46-65.

¹¹⁹ Art 4.

¹²⁰ This omission may indicate a broader oversight, which fails to associate casualisation with working time arrangements rather than exclusively with contractual status; see further Deirdre McCann 'New Frontiers of Regulation: Domestic Work, Working Conditions, and the Holistic Assessment of Nonstandard Work Norms' (2012) 34(1) *Comparative Labour Law and Policy Journal* 167; McCann and Murray, 'Prompting Formalisation' (n 114), McCann, 'Travel Time as Working Time: Tyco, the Unitary Model, and the Route to Casualization' (2016) 45(2) *Industrial Law Journal* 244.

illustrated by Section IV of the Recommendation (*Employment Policies*), which calls for measures to help low-income households to escape poverty, and includes wages policies such as the minimum wage.¹²¹ Wages policies, however, cannot adequately respond to the regulatory conduits to informalisation; in this case, legal structures that facilitate, or do not impede, casualisation. Fragmented work-forms, captured in equally splintered terminology (casual work, zero hours contracts, day labour etc.), are characterised by the absence of guaranteed hours and have harsh repercussions for the level and predictability of incomes. Yet these outcomes cannot be tempered by conventional wage policies.¹²² Necessary instead are novel - and at present only nascent - mechanisms designed specifically to regulate casual work. Other elements of the Recommendation are an equally poor match for the dynamics of informalisation. Section V (*Rights and Social Protection*) calls for measures to prevent avoidance of labour, tax, and social security laws. Yet the proposed strategies are exclusively configured towards smoothing the transition from informal to formal.¹²³ The level of detail, most strikingly, on the routes to formalisation for micro and small economic units,¹²⁴ while immensely helpful, is not matched by any comparable blueprint on preventing informalisation.

These limitations are significant, not only because they weaken Recommendation No. 204, but because they expose the centre of gravity of the international formalisation project. The project is tethered, that is, to a preoccupation with informal firms and settings. Informalisation is an adjunct. This outcome can be read as path dependence associated with the origins of the informality project, which also accounts for the late, and contested, entry of the preventive objective into the Recommendation. The assumed direction of travel is perhaps most stark in the objection of the Africa group of governments to the inclusion of the preventive objective, that 'the subject of the [Recommendation is] the transition from the informal to the formal economy, not the other way around.'¹²⁵ This objection crystallises an assumption about the orientation of the formalisation project, both within key ILO policy-making bodies and across the international and national policy realms. This focus neglects the expansive imagery of informality, its emergence, and its potential solutions of the kind pursued in this volume. It exposes a broader threat to the rapidly-evolving formalisation project that is of particular risk to its legal architecture and impedes a vigorous role for this policy realm in combatting the informalisation of formal jobs. Emphasising cure over prevention, the outcome is that the key international policy discourse on informality does not grasp the symbiotic relationship between formalisation and prevention of informalisation. It therefore does not hold these targets in the sensitive balance that is needed to underpin sophisticated policy-making and effectively to allocate resources between the twin objectives.

5. CONCLUSIONS: TOWARDS A REFINED CONCEPTION OF INFORMALISATION IN GLOBAL REGULATORY POLICY

¹²¹ Para 15(d), mentioning also social protection schemes and public employment programmes.

¹²² Para 15(d).

¹²³ Para 22.

¹²⁴ Para 25.

¹²⁵ See Report of the Committee on the Transition from the Informal to the Formal Economy (n 96), at paras 734-741.

This chapter has investigated the regulatory dimension of informality in global policy discourses with a focus on informalisation. It therefore responds to the relative neglect of informalisation within the policy debates on informal work. The chapter has observed that labour regulation literatures are devising refined conceptions of informality, which have a firmer grasp of the role of legal regulation in generating, shaping and sustaining informal work. Particularly crucial contributions from this literature were identified: the linked insights that informality is a continuum and that legal regulation governs a shifting boundary between formal and informal work. These notions are revealing when deployed to interrogate policy discourses. In this article, they have been drawn on to elaborate and to assess a recent turn in international labour policy towards the regulatory dimensions of informality. To this end, the chapter has examined policy discourses from the two most significant sites of global labour regulation policy, the World Bank and the ILO.

This analysis has revealed an unsurprising divergence in the policy narratives that emanate from the World Bank and the ILO, accompanied by some revealing convergences. World Bank policy streams have unevenly absorbed the plateau model that was unveiled in the 2013 *World Development Report*, thereby sustaining a slippery grasp of informality that eschews the continuum model and, in the recent literature, has reverted to identifying 'rigid' protective regulation as the cause of informality. An examination of the Bank's flagship *Doing Business* project has found these notions to be conveyed through a focus on substantive standards, a lack of attention to the regulatory conduits to informalisation, and an enduring neglect of labour regulation's de facto influence on working relations, including the efficacy of state enforcement. Alternative narratives within the Bank are both less prominent and more promising, including in that they highlight legal measures that have been engineered to improve the treatment of workers in non-standard working arrangements.

Recent discourses from the ILO are particularly significant, given the Organization's status as the key global host of the formalisation project, the home of the sole international standard, and the most prominent international policy forum in which trade unions play an integral role. The ILO has long recognised informality that resides in formal settings and the Organization's policy discourses are alive to certain of the associated regulatory dynamics. Yet informalisation was not a central preoccupation of the ILO until the inclusion of the preventive objective in Recommendation No. 204. The repercussions of this shift, further, have not been fully absorbed. Labour regulation mechanisms that can curb informalisation feature in the Recommendation, and it cites most of the pertinent international labour standards. Yet the Recommendation is deficient at the level of regulatory strategy. It is not as robust on what can be achieved, and how, by legal frameworks and techniques. Partially, this is because the Recommendation adopts, like the World Bank literature, a focus on the substantive standards that are enshrined in legal instruments, rather than on the intricacies of their scope, exceptions, distribution of legal obligations etc. It was concluded, then, that the formalisation project is primarily preoccupied with informal settings, rather than with informalisation of formal working relations or the balance that should be struck in regulatory policy between formalising and preventing further informalisation.

A more robust conception of informalisation, then, must be demanded from international policy-makers, which better captures the contemporary dynamics of this

phenomena and in particular the associated regulatory supports. Informality narratives are significantly driving the debates on poor quality work, prominently at the global level. Informality policy is therefore a site with which it is vital for labour law scholars to engage and where the promise and risks of labour regulation can be explored. Formalisation, in particular, is a potential gateway to incorporating legal regulation into flagship global policy discourses, including towards the UN Sustainable Development Goals. This notion would, ideally, be fashioned to embrace sophisticated conceptions of informalisation, and of legal regulation, thus marrying the formalisation project with the objective of improving - or sustaining - job quality in the formal sector. In this regard, earlier contributions have called for a *reconstructive* labour law, which builds coherent jobs from fragmented working relations.¹²⁶ This reflection on informalisation suggests a parallel *pre-emptive* labour law, which should be integrated into formalisation policies and is targeted at preventing the unravelling of decent jobs. To some degree, this is a call for an alertness to, and defence of, the architecture of the mundane. In recent decades - perhaps unexpectedly - labour regulation scholars have been called on to produce refined typologies of the mechanisms and institutions that have supported, and can extend and surpass, the standard employment model. Intensified endeavours of this type are now vital if high-quality work is to be sustained - as aspiration and reality - in the face of the increasingly intense pressures towards informalisation.

¹²⁶ McCann 'New Frontiers of Regulation,' (n 120), McCann and Murray (n 114).